THE CONSTITUTIONALITY OF THE INCOME TAX.

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As this magazine goes to press, there is being waged in the Supreme Court of the United States a battle royal over the constitutionality of the income tax, passed by the Congress which has just expired. There is a growing tendency in our American public thought to turn from the decisions of our legislatures, on lines of governmental policy, to the courts. All legislation is rapidly tending to become unconstitutional in the eyes of those who do not want it. Our own prepossessions are, we confess, strongly against an income tax of any kind at the present time. But it cannot be too often repeated that the economic expediency of the tax is not before the court, but rather the power of Congress to pass such a tax at this or any other future time, no matter what may be the needs of the government to secure a large revenue. The power of the government to raise money through taxation is essential to its existence, and should, it seems to us, be curtailed by constitutional provision and interpretation as little as possible.

There are three reasons, or classes of reasons, which are being urged on the court to induce the judges to declare the law void. First, it is said to be a direct tax, and, as such, not laid in the manner provided for in the Constitution. Second, it is said to be a class tax, and, thirdly, an unequal tax. Let us look at each of these objections in the order named.

The second section of the first article of the Constitution provides that ". . direct taxes shall be apportioned among the several states . . . according to their respective numbers," and the ninth section of the second article says, that "no capitation or other direct tax shall be laid unless in proportion to the census hereinbefore directed to be taken." It is needless to point out the fact that this peculiar provision in the

Constitution of the United States was the outcome of state jealousies at the time of the adoption of the Constitution. It always has been, and always will be, a bugbear in the way of just and equitable taxation on land or on anything else which the Supreme Court declares falls in the class on which taxation, when laid, is declared to be direct taxation. For instance, a tax on land must be assessed according to its value, or according to its acreage. Whether a tax on the rents received from land is a tax on land, is a mooted question, and one of the minor points presented by this case. Whether Congress adopts, in assessing taxes on land, the acreage or the value as the basis of the assessment, the tax, instead of falling equally throughout the Union on lands of equal value or equal area, falls, in consequence of this obnoxious provision in the Constitution, in a different ratio on the lands of each state. The value of land *per capita* in New York may be twice as great as the value of land *per capita* in Texas, or *vice versa*. In the former case the rate in New York would be twice as great as the rate in Texas. For instance in the income tax of 1861 (12 Stat. at Large, 294), New York was taxed two million one hundred and sixteen thousand dollars and over, while Pennsylvania was taxed one million nine hundred thousand. Yet the relative value of the land in the two states was not as the tax. To declare an income tax, or any other tax, a direct tax, is equivalent to saying that Congress cannot pass such a tax without committing great inequality and injustice—practically, that Congress cannot tax the subject at all, except possibly in time of war, because the rate at which any income .. uld be taxed would vary in each state. This, it may be urged, is treating the question only from the standpoint of practical expediency. However undesirable the method for assessing direct taxes, the provision in the Constitution, as to the manner in which such tax should be assessed, is plain. This is true, but what is meant by the term "direct taxes," is not at all plain. If we put the question "what did the Constitutional Convention mean by 'direct taxes?'" the only answer which historical records give us is, that the term "direct taxes" was used in as loose and indefinite way by our ancestors as it is by our

modern political economists.[1] Since the words themselves will bear almost any construction which the court in its wisdom chooses to put upon them, and since to declare a tax a direct tax is practically to say that Congress has no power to pass such a tax, every consideration of public policy would seem to urge the court to curtail in the present instance as they have curtailed in the past, the definition of direct taxes under the Constitution, confining the meaning of the term to a capitation tax and a tax on land. When the words of the Constitution will admit of one of two meanings, one of which causes the instrument to provide for injustice and inequality, that meaning should not be adopted. This was the gist of Mr. Justice CHASE'S argument in the case of *Hylton* v. *United States* (3 Dall. 171). The question there was whether a tax on carriages was a direct tax. He says (p. 174): "If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule."[2]

The case was followed in that of *Springer* v. *United States* (102 U. S, 586), a case in which the Supreme Court, without a dissenting a voice, declared an income tax constitutional and not a direct tax.

It may be an unwise economic policy which to-day passes an income tax; but the court is deciding not only for to-day, but for all future time. Those who are asking the judges to declare the tax a direct tax are asking them to say, that no matter what the financial strait of the national government, money cannot be raised by an income tax, though this method of procuring revenue has been adopted by our government in time of great financial need, and is now in operation in almost every civilized country of the world.

If an income tax is not a direct tax, it is undoubtedly within the power of Congress to say that all incomes, except

[1] See review of historical matter in op. of Mr. Justice SWAYNE, in case of *Springer* v. *United States*, 102 U. S., p. 592, *et sec.*

[2] Such substantially is Hamilton's Argument. See Works, Vol. VII, p. 848, where his brief as counsel in the case is given.

those received as salaries from the state government, or as interest on the bonds of the states, shall be taxed.

The next question is, therefore, whether in laying such a tax Congress can define the class of incomes to be taxed, saying that all over a certain amount shall be taxed, while those under that amount are exempt. It is admitted by all that a wide discretion is vested in Congress, in defining a class of subjects to be taxed. For instance, Congress can tax all wagons; they can also tax all pleasure carriages; or, curtailing the class still more, all pleasure carriages with two wheels; or, still again, all pleasure carriages with two wheels of a diameter over a certain number of inches. However foolish such fine distinctions would be, one would hardly contend that Congress had exceeded the discretion vested in it of selecting the class of property to be taxed. Again, Congress can undonbtedly tax the income of all persons of a particular class, as, all the fees of brokers or the gains of all bankers. Now, the critical point, in the case before the court, is whether the line can be drawn, not as to sources of income but as to amount of income. The old income tax drew the exemption line at six hundred dollars. This tax draws it at four thousand dollars. If this limit is unconstitutional, the old limit is also unconstitutional. The question of where the limit should be drawn, if it can be drawn at all, is simply a matter for Congress to determine. If Congress has no power to make one limit, it has no power to make another. This general argument may be excepted to on the theory that, while all exemptions in an income tax are unconstitutional, one limit, as an exception, will be admitted—that is, where the income of the person who would otherwise be taxed is so small that there is danger of his becoming a charge on the community. It might be contended that while Congress had, as a general proposition, no right to exempt any income, no matter how small, a very low limit might be upheld, perhaps, on some new theory of the police power.

The main question, therefore, in this case, is whether there is vested in Congress any discretion, in laying an income tax, to say that incomes under a certain point will not be taxed.

Those who advocate the curtailment of the power of Congress in this respect, in order to sustain their arguments, immediately put an extreme case. We have heard, for instance, an argument like this:

"Supposing Congress were to tax incomes over one hundred thousand dollars, eighty per cent., while exempting all below one hundred thousand dollars. Would this not clearly be an unwarranted exercise of congressional discretion for the purpose of confiscating the property of a particular class of people?" For one, we would have no hesitation in answering such a question in the affirmative. But the main ground on which the unconstitutionality of such an act would rest, would not be that the line was drawn at one hundred thousand dollars, but that the amount of the tax, in view of the narrow class on which it fell, rendered the whole proceeding not a law, but a tyrannous exercise of arbitrary power. The present income tax is exceedingly moderate in amount. It is, in no sense, a confiscatory tax. True, it only falls on property of a particular class, *i. e.*, property received by persons having more than four thousand dollars a year. But the classification of subjects to be taxed is under the discretion of Congress. The only limit which can fairly be put on this discretion is, that the amount of the tax, in connection with the subject taxed, must not be so arranged as to amount to a confiscation of the special subject on which the tax is laid.

While admitting the strength of many of the able arguments now being urged before the Supreme Court on this point by those opposed to the tax, the radical fault of all seems, to the writer, to be that it is assumed the income tax is a tax on persons rather than a tax on property. If it was a tax on persons, a sort of capitation tax, no one would doubt its unconstitutionality. The Congress has no more right to say that persons of over four thousand dollars income shall be taxed a definite sum per capita, while those under four thousand dollars shall be exempt, than they have to tax all people over six feet high. But it is a principal of taxation that a tax falls on that which is the basis of its assessment. The basis here is income, not the individual. The tax is paid by individuals; but that can be said

of all taxes. The tax is a tax on property received during the year over four thousand dollars, not a tax of so much a person on all persons having an income of over four thousand.

The third argument against the tax is that it is unequal—that is, falling on persons or things of the same class unequally. There are many supposed inequalities pointed out. One of the chief is as follows: If I have an income from the bonds and stock of corporations, I have to pay the tax, even though I have an income of less than four thousand dallars a year. I suppose it will be admitted by all that a tax on the dividends of corporations is constitutional; also that there is no constitutional prohibition against taxing two subjects in the same tax law. It seems to us that this is all that Congress has done in the act in question. They have not taxed one person twice for the same property, and another person once for the same species of property; but they have taxed all incomes from corporations and all incomes which exceed four thousand dollars, allowing those persons who have already paid a tax on corporation stocks and bonds to deduct that tax from the income tax which they would otherwise have to pay. Wherein, as a result of the whole law, is a man who has to pay an income tax, because his income is over four thousand dollars, better or worse off, because of the possession of property in corporations? The man who has not an income of four thousand dollars cannot complain if the United States chooses to tax his income from a specific class of property.

Another complication of the law is the tax on incomes from inheritances of personal property. All men who receive inheritances are not taxed, but only those who receive inheritances of personalty which, coupled with their income during that year, exceed the sum of four thousand dollars. We fail to see why, if Congress can fix any lower limit of taxation on money received during the year, they cannot particularize what shall be considered income. Declaring that money from gift or devise shall be considered as income for the purposes of the assessment, and selecting a definite class of property, so received, as personal property, does not viciate the tax other-

wise constitutional. This last claim of inequality, therefore, really comes back to what we have stated to be, in our opinion, the crucial point of the case; that is, whether Congress can draw any lines in an income tax, exempting incomes under a particular figure.

We might also point out that on the decision of this point there depends another and still more important question. If Congress cannot draw any lines, below which incomes will be exempt, neither can they draw any lines making different rates of taxation for different incomes, as all incomes above five thousand dollars, three per cent., between four and five thousand, two per cent, and under four thousand, one per cent. Thus an adverse decision of the court in this case would prevent Congress from passing what is known as proportional income tax, or a proportional tax of any kind. If this present tax is unconstitutional on the ground of inequality, the income tax of 1862 was void. That law taxed incomes over six hundred dollars, at the rate of three per cent., while incomes over three thousand dollars paid five per cent.